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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PHL VARIABLE INSURANCE  
COMPANY,

Plaintiff,

v.

CONTINENTAL CASUALTY  
COMPANY, et al.,

Defendants.

Case No. [19-cv-06799-CRB](#)

**ORDER GRANTING MOTION TO  
REMAND AND DENYING AS MOOT  
ADDITIONAL MOTIONS**

Now pending is Plaintiff PHL Variable Insurance Company’s (“PHL”) motion to remand this action to the Superior Court for the County of San Francisco. Remand Mot. (dkt. 12) at 1. PHL filed its First Amended Complaint in that court, seeking a declaration of its rights under insurance policies it holds against Defendants Continental Casualty Company (“CNA”) and Certain Underwriters at Lloyd’s of London (the “Lloyd’s Defendants”). See generally First Amended Complaint (“FAC”), Notice of Removal (“Notice”) Ex. 2 (dkt. 1–3). CNA removed the action to this Court based on diversity jurisdiction. Notice at 3. CNA requests that the Court deny the motion to remand and dismiss or stay the action, or in the alternative, transfer it to the United States District Court for the District of Connecticut, where CNA already filed its own action against PHL regarding the same controversy. See generally Mot. to Dismiss or Stay, or Transfer (“Transfer Mot.”) (dkt. 4). The Lloyd’s Defendants, excess insurers in this case, move to dismiss the action against them for failure to state a claim, arguing that PHL cannot bring suit against them until PHL exhausts its primary policy with CNA. See Mot. to Dismiss (dkt. 20). For the reasons discussed below, the Court GRANTS the motion to remand, and DENIES AS MOOT the motions to transfer and dismiss.

1           **I. BACKGROUND**

2           **A. The Coverage Dispute Actions**

3           This litigation arises out of a pair of class actions that certain PHL life insurance  
4 policyholders filed against PHL in the Southern District of New York, alleging breach of contract.  
5 FAC at ¶¶ 14–18. PHL holds policies of its own that it contends should cover its costs relating to  
6 the underlying litigation. First, it holds a primary Management Liability Solutions Policy (the  
7 “Primary Policy”) issued by CNA, which has a liability limit of \$10,000,000. Id. at ¶ 10. Second,  
8 it holds two Excess Policies (the “First Excess Policy” and “Second Excess Policy”) with Certain  
9 Underwriters at Lloyd’s of London (the “Lloyd’s Defendants”). Id. at ¶¶ 55–56. The First Excess  
10 Policy has a liability limit of \$10,000,000, and the Second Excess Policy has a liability limit of  
11 \$20,000,000. Id. at ¶ 58. PHL contends that it is entitled to full coverage of its defense costs  
12 under the policies, notified CNA to that effect, and requested indemnification. See id. at ¶¶ 24–26.  
13 CNA disputed the extent of coverage, and ultimately denied coverage entirely. See id. at ¶ 30.  
14 Meanwhile, PHL requested that the Lloyd’s Defendants further articulate their position on the  
15 extent of coverage under the Excess Policies, which the Lloyd’s Defendants refused to do. See id.  
16 at ¶¶ 60–65.

17           CNA was first to file in this controversy, having brought suit in the District Court for the  
18 District of Connecticut against PHL seeking declaratory relief as to the coverage dispute. See  
19 Transfer Mot. at 3–4. Shortly afterwards, PHL filed a Complaint in San Francisco Superior Court  
20 naming CNA, and then a FAC joining the Lloyd’s Defendants. Notice at ¶¶ 1–5. CNA then  
21 removed the action to this Court. See generally Notice.

22           **B. Lloyd’s of London and its Underwriters**

23           Certain of the issues raised in this case require an understanding of the peculiar  
24 organizational structure of Lloyd’s of London (“Lloyd’s”) and its underwriters. Lloyd’s itself is  
25 not an insurance company and does not underwrite risk. Underwriters at Lloyd’s, London v.  
26 Osting-Schwinn, 613 F.3d 1079, 1083 (11th Cir. 2010). Rather, Lloyd’s serves as a marketplace  
27 where investors, referred to as “Names,” buy and sell insurance risk. Id. The Names are  
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1 organized through administrative subgroups called syndicates, which are themselves often  
2 organized into larger groups called consortiums. Id. The Names are severally, but not jointly,  
3 liable to the insured for their proportion of the underwritten risk. Id. The syndicates are not  
4 incorporated, but are generally organized by Managing Agents who may or may not be  
5 corporations. Id. The Names themselves can be people or corporations from many nationalities—  
6 not just the United Kingdom. Id.

7 **II. LEGAL STANDARD**

8 **A. Motion to Remand and Diversity Jurisdiction**

9 “[A]ny civil action brought in a State court of which the district courts of the United States  
10 have original jurisdiction, may be removed by the defendant or the defendants, to the district court  
11 of the United States for the district and division embracing the place where such action is  
12 pending.” 28 U.S.C. § 1441(a). “A defendant may remove an action to federal court based on  
13 federal question jurisdiction or diversity jurisdiction.” Hunter v. Philip Morris USA, 582 F.3d  
14 1039, 1042 (9th Cir. 2009) (citing 28 U.S.C. § 1441). District courts have diversity jurisdiction  
15 over all civil actions between citizens of different states where the amount in controversy exceeds  
16 \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332 (“Section 1332”). Consistent with the  
17 framework outlined above, “[t]he party seeking to invoke the district court’s diversity jurisdiction  
18 always bears the burden of both pleading and proving diversity jurisdiction.” NewGen LLC v.  
19 Safe Cig, LLC, 840 F.3d 606, 613–14 (9th Cir. 2016).

20 If a district court ultimately determines that it lacks jurisdiction, the action must be  
21 remanded back to state court. Martin v. Franklin Capital Corp., 546 U.S. 132, 134 (2005) (citing  
22 28 U.S.C. § 1447). The Ninth Circuit recognizes a “strong presumption against removal.”  
23 Hunter, 582 F.3d at 1042 (quoting Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992) (per  
24 curiam)). Thus, “‘the defendant always has the burden of establishing that removal is proper,’ and  
25 . . . the court resolves all ambiguity in favor of remand to state court.” Id. (quoting Gaus, 980 F.2d  
26 at 566).

1           **B.       Fraudulent Joinder**

2           “Although an action may be removed to federal court only where there is complete  
3 diversity of citizenship, ‘one exception to the requirement for complete diversity is where a non-  
4 diverse defendant has been ‘fraudulently joined.’” Hunter, 582 F.3d at 1043 (quoting Morris v.  
5 Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001)) (internal citation omitted); see also  
6 Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318–19 (9th Cir. 1998). “If a plaintiff fails to state  
7 a cause of action against a resident defendant, and the failure is obvious according to the settled  
8 rules of the state, the joinder of the resident defendant is fraudulent.” McCabe v. Gen. Foods  
9 Corp., 811 F.2d 1336, 1339 (9th Cir. 1987).

10          That said, there is a “general presumption against fraudulent joinder,” and defendants who  
11 assert that a party is fraudulently joined carry a “heavy burden.” Hunter, 582 F.3d at 1046.  
12 Defendants must “show that the individuals joined in the action cannot be liable on any theory,”  
13 Ritchey, 139 F.3d at 1318, and that “there is no possibility that the plaintiff will be able to  
14 establish a cause of action in State court against the alleged sham defendant,” Good v. Prudential  
15 Ins. Co. of Am., 5 F. Supp. 2d 804, 807 (N.D. Cal. Apr. 16, 1998). That is, “[r]emand must be  
16 granted unless the defendant shows that the plaintiff ‘would not be afforded leave to amend his  
17 complaint to cure [the] purported deficiency.’” Padilla v. AT&T Corp., 697 F. Supp. 2d 1156,  
18 1159 (C.D. Cal. 2009) (quoting Burris v. AT & T Wireless, Inc., No. 06–CV–02904–JSW, 2006  
19 WL 2038040, at \*2 (N.D. Cal. July 19, 2006)). As such, a court’s “doubts concerning the  
20 sufficiency of a cause of action because of inartful, ambiguous or technically defective pleading  
21 must be resolved in favor of remand.” Plute v. Roadway Package Sys., Inc., 141 F. Supp. 2d  
22 1005, 1008 (N.D. Cal. Apr. 18, 2001) (citations and internal quotation marks omitted).

23          “Where fraudulent joinder is an issue . . . [t]he defendant seeking removal to the federal  
24 court is entitled to present the facts showing the joinder to be fraudulent.” Ritchey, 139 F.3d at  
25 1318 (internal quotation marks omitted). If factual issues are in dispute, the Court must resolve all  
26 disputed questions of fact in favor of the plaintiff. See Kalawe v. KFC Nat. Mgmt. Co., Civ. No.  
27 90–007799, 1991 WL 338566, at \*2 (D. Haw. July 16, 1991) (citing Kruso v. Int’l Tel. & Tel.  
28 Corp., 872 F.2d 1416, 1426 (9th Cir. 1989)); see also Mohammed v. Watson Pharm., Inc., No. SA

1 CV09-0079, 2009 WL 857517, at \*6 (C.D. Cal. Mar. 26, 2009) (“A party is only deemed to have  
2 been joined ‘fraudulently’ if after all disputed questions of fact and all ambiguities in the  
3 controlling state law are resolved in the plaintiff’s favor, the plaintiff could not possibly recover  
4 against the party whose joinder is questioned.” (citations and internal quotation marks omitted)).

5 **III. DISCUSSION**

6 PHL asks the Court to remand the case to the San Francisco Superior Court, arguing that  
7 Defendants have not proven that (1) each Lloyd’s Defendant has diverse citizenship and (2) the  
8 individual claim against each Lloyd’s Defendant meets the minimum amount in controversy  
9 requirement. See Remand Mot. at 8–12. The Lloyd’s Defendants respond that their evidence  
10 proves diversity of citizenship, and that they can meet the minimum amount in controversy by  
11 aggregating the claims against them. If the Court determines that the Lloyd’s Defendants are non-  
12 diverse, they argue that: (1) they were fraudulently joined; (2) the Court should extend  
13 supplemental jurisdiction over the claims anyway; and (3) if the Court does not extend  
14 supplemental jurisdiction, the Lloyd’s Defendants should be severed and dismissed to perfect  
15 diversity jurisdiction over the rest of the claims.

16 As discussed below, the prevailing law requires that each claim against each Lloyd’s  
17 Defendant meet the minimum amount in controversy requirement—they cannot aggregate the  
18 claims. Even viewing the evidence in a light most favorable to Defendants, the claims against  
19 many of the Lloyd’s Defendants cannot meet the requirement, as one of the Lloyd’s syndicates  
20 consists of over a thousand Names. Resultingly, the amount in controversy as to each individual  
21 Name in that syndicate is far below the required amount in controversy. The rest of Defendants’  
22 arguments fail as well. They were not fraudulently joined, the Court cannot exercise supplemental  
23 jurisdiction over the claims, and the Court, in its discretion, declines to sever the Lloyd’s  
24 Defendants to perfect diversity. Having no subject matter jurisdiction, the Court will remand the  
25 action, thus mooting Defendants’ motions.

26 **A. The Court Lacks Diversity Jurisdiction**

27 The removing parties assert only diversity as a basis for subject matter jurisdiction in this

case. See Notice of Removal at 1. District courts have diversity jurisdiction over civil cases where (1) the matter “is between . . . citizens of different States,” and (2) the amount in controversy “exceeds the sum or value of \$75,000, exclusive of interest and costs.” 28 U.S.C. § 1332(a)(1). Consistent with the framework outlined above, “[t]he party seeking to invoke the district court’s diversity jurisdiction always bears the burden of both pleading and proving diversity jurisdiction.” NewGen LLC v. Safe Cig, LLC, 840 F.3d 606, 613–14 (9th Cir. 2016).

There is some disagreement among the Circuits as to how Lloyd’s peculiar organizational structure impacts diversity jurisdiction analysis. Majestic Ins. Co. v. Allianz Int’l Ins. Co., 133 F. Supp. 2d 1218, 1221 (N.D. Cal. 2001) (explaining split between Second, Sixth, and Seventh Circuits). The prevailing trend, and the trend in California and in this District, is to adopt the Second Circuit’s treatment of Lloyd’s articulated in E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 931 (2d Cir. 1998), which requires a court to consider the citizenship and amount in controversy as to each Name for the purposes of diversity analysis. See Majestic Ins. Co., 133 F. Supp. 2d 1222; see also Certain Underwriters at Lloyd’s of London Subscribing to Policy No. FINFR 1001771 v. Commonwealth Int’l, Inc., No. 2:12-CV-00824-ODW, 2012 WL 2328215, at \*2 (C.D. Cal. June 19, 2012); Certain Underwriters at Lloyd’s London v. Raytheon Co., No. C 01-03317 WHA, 2001 WL 1836268, at \*2 (N.D. Cal. Dec. 4, 2001); Genstar Container Corp. v. Certain Underwriters at Lloyd’s Subscribing to that Ins. Policy Numbered C70408, No. C-00-0361 PJH, 2000 WL 1897299, at \*2 (N.D. Cal. Dec. 22, 2000). Squibb relied heavily on Carden, in which the Supreme Court held that diversity jurisdiction in a suit by or against an entity depends on the citizenship of all of its members. 160 F.3d at 931 (citing Carden v. Arkoma Assocs., 494 U.S. 185, 195 (1990)).

### 23           **1. Diversity of Citizenship**

24           The Second Circuit held in Squibb, 160 F.3d at 931, that the party invoking diversity jurisdiction over Lloyd’s underwriters must establish diversity of citizenship as to each of the individual Names that make up a syndicate, rather than just the lead underwriter or managing agent of a given policy. As the removing parties here, Defendants carry the burden of proving

1 diversity as to each Lloyd's Defendant. Defendants alleged in their Notice of Removal that none  
2 of the Names are citizens of California or Connecticut. Notice at 3. Defense counsel also  
3 supplied declarations attesting that none of the Names are citizens of California or Connecticut.  
4 See Bach Decl., Ex. A at ¶¶ 14–24; Lucas Decl., Ex. B at ¶¶ 14–44; Winterbourne Decl., Ex. C at  
5 ¶¶ 10–20; Pecego Decl., Ex. D at ¶¶ 10–20.

6 PHL argues that Defendants fail to establish that certain of the Names are corporations, as  
7 opposed to some other kind of business organization, thus barring the Court from determining  
8 citizenship. See Remand Reply at 5 (citing Parse v. Those Certain Underwriters at Lloyd's  
9 London, No. CV1400782MMMJEMX, 2014 WL 12561586, at \*2 (C.D. Cal. Mar. 4, 2014)). In  
10 Parse, Lloyd's merely alleged that certain Names were “entities” organized under the laws of the  
11 United Kingdom,” id., whereas here, Defendants' Declarations specifically use the term  
12 “incorporated,” see, e.g., Bach Decl., Ex. A at ¶ 15, so the argument that Defendants failed to  
13 plead incorporation fails. PHL points out that in Liberty Nw. Ins. Co. v. Certain Underwriters at  
14 Lloyd's, No. 15-CV-02334-WHO, 2015 WL 5012758, at \*3 (N.D. Cal. Aug. 24, 2015), Judge  
15 Orrick held that conclusory allegations that none of the Names were citizens of the forum state  
16 were insufficient, and remanded on that basis. Although the Notice here is similar, defendants'  
17 Declarations affirmatively allege that each and every Name is incorporated, resides in, or is  
18 otherwise domiciled in the United Kingdom. See Bach Decl., Ex. A at ¶¶ 14–24; Lucas Decl., Ex.  
19 B at ¶¶ 14–44; Winterbourne Decl., Ex. C at ¶¶ 10–20; Pecego Decl., Ex. D at ¶¶ 10–20.

20 Though the Notice of Removal fails to establish the Names' citizenship, the Declarations  
21 cure that deficiency. In Certain Underwriters at Lloyd's of London Subscribing to Policy No.  
22 FINFR 1001771 v. Commonwealth Int'l, Inc., No. 2:12-CV-00824-ODW, 2012 WL 2328215, at  
23 \*2 (C.D. Cal. June 19, 2012), Lloyd's affirmatively alleged that each Name was incorporated and  
24 did business in the United Kingdom; the court, noting that party moving for remand offered no  
25 contradictory evidence, held that the allegations were sufficient. Such is the case here. PHL does  
26 not offer any evidence to contradict Defendants' assertions, so the Court finds that they have  
27 proven diverse citizenship.

1                   **2.         Amount in Controversy**

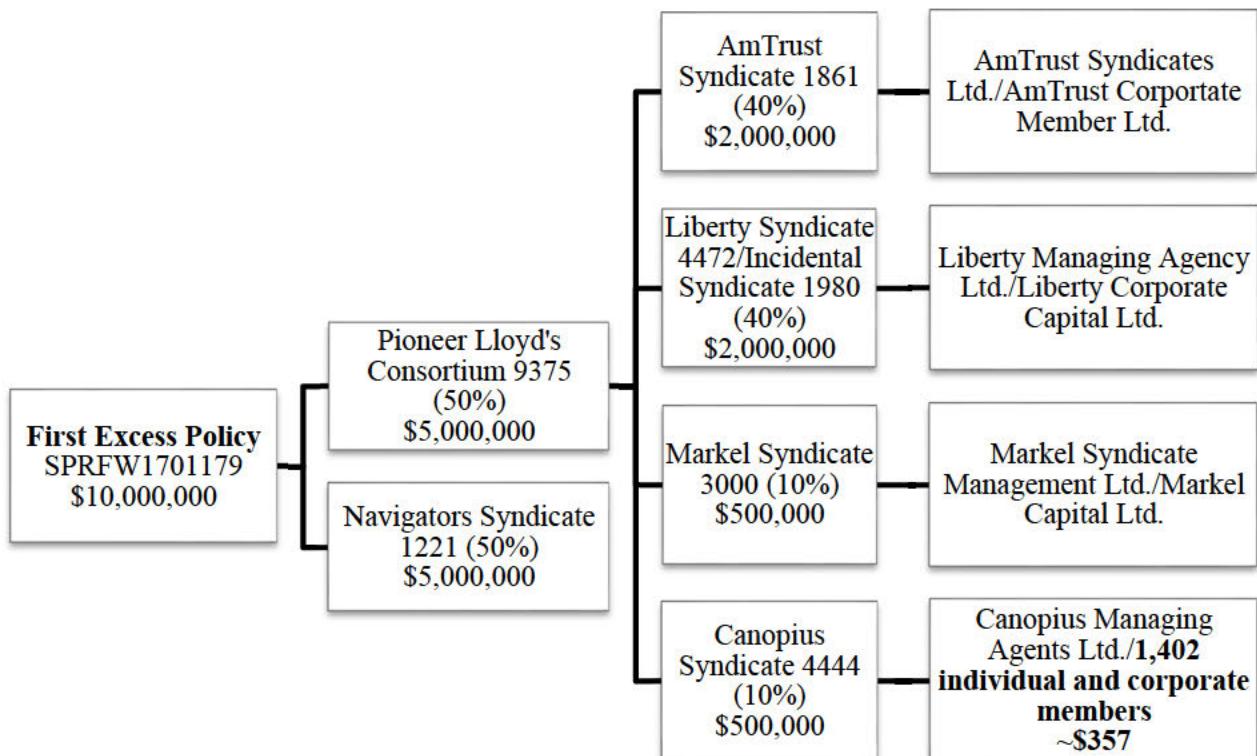
2                   The amount in controversy requirement is a different story. Under the policies at issue, the  
3 Names are severally, but not jointly, liable. Eagan Decl., Ex. B at 7 (dkt. 12–2). Therefore,  
4 Defendants must show that each Name meets the amount in controversy requirement. See Squibb,  
5 160 F.3d at 933 (“Aggregation to achieve diversity jurisdiction is barred when the liability of the  
6 defendants is several and not joint . . . each and every severally liable defendant must, in the  
7 normal course of things, meet the amount in controversy”).

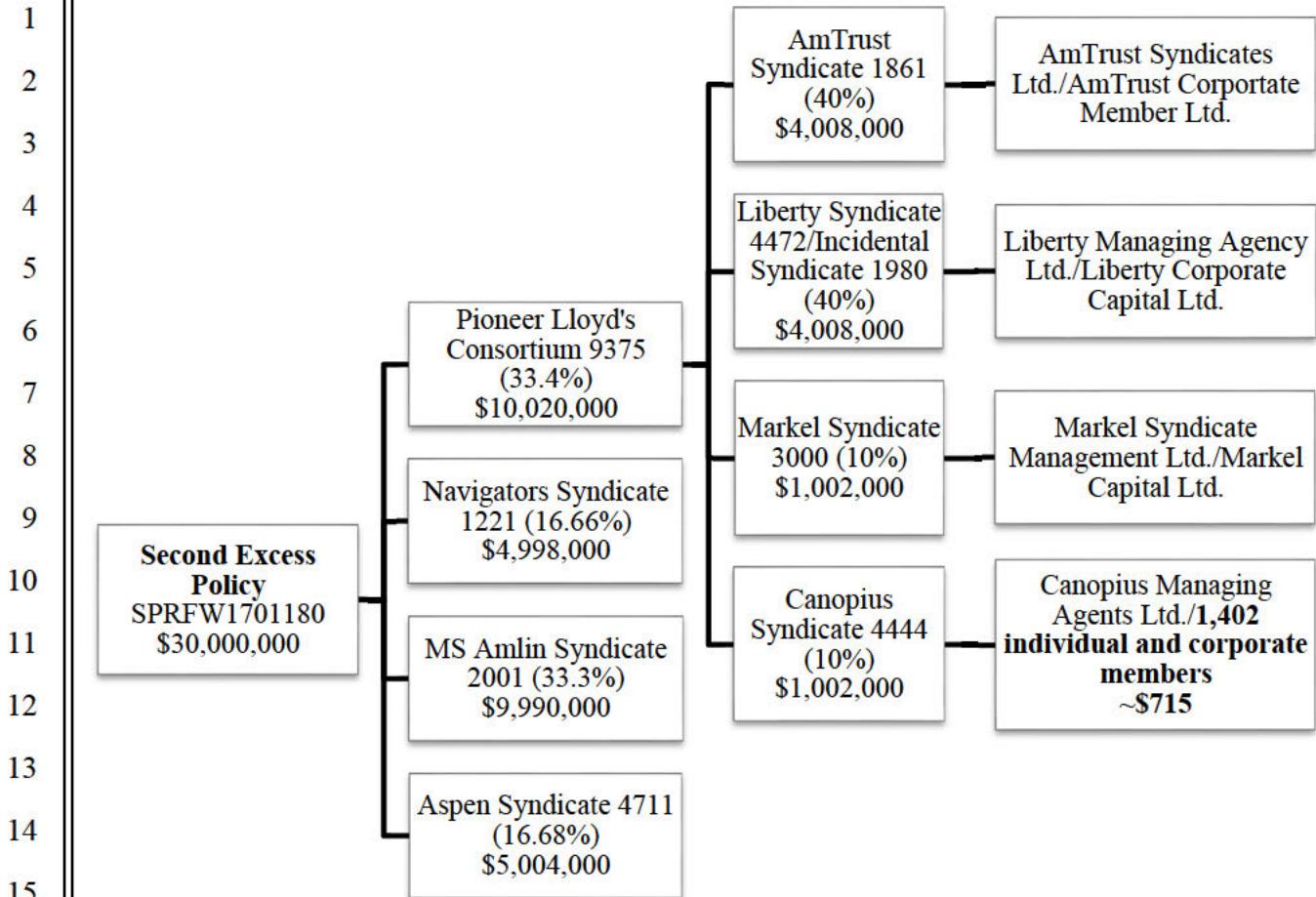
8                   Defendants argue that a case from the Southern District of Texas justifies aggregating the  
9 claims, but that case is not applicable here. See Remand Opp’n at 5 (citing Cronin v. State Farm  
10 Lloyds, No. CIV.A.H-08-1983, 2008 WL 4649653, at \*5 (S.D. Tex. Oct. 10, 2008)). In Cronin,  
11 the court discussed at length the distinction between the entities in that case (called “Texas  
12 Lloyd’s”), which are “singular legal entities created by Texas law,” and the traditional Lloyd’s  
13 entities present here. See id. In fact, the court in Cronin seemed to fully endorse the holding in  
14 Squibb as it pertains to Lloyd’s of London policies, and did not argue against it. Squibb simply  
15 did not apply to the particular entities in Cronin, which were creatures unique to Texas law. See  
16 id. Thus, Cronin does not just fail to support aggregation of the claims here—it works directly  
17 against it.

18                   Defendants’ argument that the Court should only consider the consortium leader for  
19 diversity purposes fails as well. See Remand Opp’n at 6. Their only case supporting this  
20 argument involved the leader of a bank consortium suing a debtor, and citizenship questions  
21 stemming therefrom, but these facts have little relevance here. See Chase Manhattan Bank v.  
22 Motorola, Inc., 136 F. Supp. 2d 265, 271 (S.D.N.Y. 2001). Moreover, the court in Chase  
23 Manhattan specifically discussed Squibb and the state of the law as it pertains to Lloyd’s. Id. at  
24 269. The court noted that ordinarily, suits brought against Lloyd’s Names require consideration of  
25 each and every Name for diversity purposes. See id. An exception to that rule, upon which  
26 Defendants rely, arises when an insured files suit against only the consortium leader in its  
27 individual, not representative, capacity, effectively excluding the Names as parties to the action.  
28 See id. But in the instant suit, PHL refers to the Names generally as parties and makes no mention

1 of specifically suing the consortium leaders in their individual capacities. See FAC at ¶ 7. As in  
2 Squibb, the Court applies the amount in controversy requirement to each claim against each  
3 defendant.

4 As they must, Defendants admit that they cannot meet this requirement. Remand Opp'n at  
5 6 (dkt. 33) ("PHL does seek more than \$75,000 from each name comprising the Lloyd's  
6 Defendants except one") (emphasis added). One of the syndicates here, Canopius Syndicate 4444,  
7 comprises 1,402 Names, each severally liable for its share of each policy. As demonstrated in the  
8 charts below, each Name in Canopius Syndicate 4444 is maximally liable for approximately  
9 \$1,072 (\$357 from the First Excess Policy, and \$715 from the Second Excess Policy), well short  
10 of the required minimum. Thus, it is not "one" defendant that fails to satisfy the amount in  
11 controversy requirement, as Defendants assert, but 1,402.





Defendants argue that this is a “patently unreasonable interpretation” of the diversity jurisdiction requirements. Remand Opp’n at 5. Maybe so; in Carden, Justice Scalia acknowledged that requiring consideration of each member of an entity for diversity analysis is “technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization.” See 494 U.S. at 196. Despite this acknowledgement, he maintained the law as described above. Id. at 195. Defendants are not wrong to argue, in addition, that this result seems unmoored from the purpose of the amount in controversy requirement; that is, keeping small cases out of federal court, see Remand Opp’n at 6, but policy arguments cannot overcome the clear directives of the law. Because many Lloyd’s Defendants cannot satisfy the required amount in controversy, the Court finds that it does not have diversity jurisdiction over the case.

1           **B.     The Court Lacks Supplemental Jurisdiction**

2           Defendants argue that, in the absence of diversity, the Court should exercise supplemental  
3 jurisdiction over the Lloyd's claims. See Remand Opp'n at 7–9 (citing 28 U.S.C. § 1367  
4 (“Section 1367”)). Section 1367 allows a court to exercise supplemental jurisdiction over claims  
5 that arise out of the same case or controversy as a claim over which the court has original  
6 jurisdiction. However, Section 1367(b) states that when a court derives original jurisdiction solely  
7 from Section 1332 (i.e., diversity jurisdiction), there is no supplemental jurisdiction over claims  
8 made against parties joined under Rule 19 or 20. 28 U.S.C. § 1367(b). Defendants attempt to  
9 construe Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005) in their favor, but that  
10 case concerned supplement jurisdiction over non-diverse plaintiffs joined to an action. Id. at 560.  
11 Exxon Mobil Corp. reiterated the plain directive of the statute as it pertains to defendants, stating  
12 that “§ 1367(b) explicitly excludes supplemental jurisdiction over claims against defendants joined  
13 under Rule 20.” Id. The Lloyd's Defendants are permissively joined parties per Rule 20, and the  
14 Court's original jurisdiction over the action stems from diversity, therefore the Court cannot have  
15 supplemental jurisdiction over the Lloyd's claims.

16           **C.     The Lloyd's Defendants Were Not Fraudulently Joined**

17           Defendants argue that the Lloyd's Defendants were fraudulently joined because PHL's  
18 cause of action against them cannot possibly succeed. See Remand Opp'n at 10–13. In order to  
19 prove fraudulent joinder, a defendant must prove that “after all disputed questions of fact and all  
20 ambiguities in the controlling state law are resolved in the plaintiff's favor, the plaintiff could not  
21 possibly recover against the party whose joinder is questioned.” Kalawe v. KFC Mgmt. Co., 1991  
22 WL 338566, at \*2 (D. Haw. 1991) (citing Kruso v. Int'l Telephone & Telegraph Corp., 872 F.2d  
23 1416, 1426 (9th Cir. 1989)). Although the removing defendant may present facts to prove the  
24 fraudulent joinder, courts “must resolve all disputed questions of fact in favor of the plaintiff.”  
25 Good v. Prudential Ins. Co. of America, 5 F. Supp. 2d 804, 807 (N.D. Cal. 1998).

26           Defendants' argument that PHL cannot possibly succeed on its claim against the Lloyd's  
27 Defendants because it has not exhausted the primary policy fails to persuade. See Remand Opp'n  
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1 at 11 (citing Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1504 (9th Cir. 1994)). However,  
2 PHL’s claim against the Lloyd’s Defendants is only for declaratory relief, not breach of contract.  
3 FAC at ¶¶ 81–87. The Ninth Circuit discussed declaratory relief in Iolab, but only to say that the  
4 district court did not abuse its discretion by declining to sua sponte treat the plaintiff’s breach of  
5 contract action as a declaratory relief action. See Iolab, 15 F.3d at 1504–05. The plaintiff in Iolab  
6 brought a claim for breach of contract, not declaratory relief, and never asked the district court to  
7 treat the claim as a request for declaratory relief; rather, it argued on appeal that the district court  
8 should have done so on its own—a contention the Ninth Circuit rejected. Id. This issue simply is  
9 not present here, as PHL requested declaratory relief in the first instance.

10 Defendants fail to demonstrate that PHL cannot possibly succeed on its claim against  
11 Lloyd’s, because California law allows insureds to file declaratory relief actions against excess  
12 insurers without showing exhaustion of primary policies. In California, “the party need not  
13 establish a right to a favorable declaration” to be entitled to declaratory relief. Lockheed Martin  
14 Corp. v. Cont’l Ins. Co., 134 Cal. App. 4th 187, 221 (2005), disapproved on other grounds by  
15 State of Cal. v. Allstate Ins. Co., 45 Cal. 4th 1008 (2009). California “does not require an insured  
16 to show a reasonable probability of exhaustion of its primary coverage before it may state a cause  
17 of action for declaratory relief against an excess insurer,” and only requires “that there be an actual  
18 controversy relating to the legal rights and duties of the respective parties.” Lockheed Martin, 134  
19 Cal. App. 4th 220. PHL asserts a number of disputed issues regarding the coverage of the Excess  
20 Policies, see FAC at ¶¶ 82–86, and under California law, can seek a declaratory judgement to  
21 resolve those issues. Defendants, relying solely on their exhaustion argument, have not shown  
22 that PHL cannot possibly succeed on its request for declaratory relief against the Lloyd’s  
23 Defendants after all ambiguities are resolved in PHL’s favor. The Lloyd’s Defendants were not  
24 fraudulently joined.

25 **D. Severance**

26 Finally, Defendants argue that the Court, if unconvinced by their arguments above, should  
27 use its discretion under Federal Rule of Civil Procedure 21 to sever and dismiss the action against  
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1 the Lloyd’s Defendants to perfect diversity jurisdiction. See Remand Opp’n at 9. Rule 21  
2 provides that “the court may at any time, on just terms, add or drop a party” and that “[t]he court  
3 may also sever any claim against a party.” Fed. R. Civ. P. 21. Rule 21 grants a court  
4 “discretionary power to perfect its diversity jurisdiction provided the nondiverse party is not  
5 indispensable to the action under Rule 19.” Kirkland v. Legion Ins. Co., 343 F.3d 1135, 1142 (9th  
6 Cir. 2003) (citing Sams v. Beech Aircraft Corp., 625 F.2d 273, 277 (9th Cir. 1980)). In exercising  
7 this discretion, “the paramount considerations are the interests of justice.” Anrig v. Ringsby  
8 United, 603 F.2d 1319, 1325 (9th Cir. 1978). The Ninth Circuit considers the four factors outlined  
9 in Federal Rule of Civil Procedure 19(b) to determine if a party is indispensable. See White v.  
10 Univ. of Cal., 765 F.3d 1010, 1027 (9th Cir. 2014).

11 The Court is not obligated to, and will not, sever the Lloyd’s Defendants from the case to  
12 perfect diversity jurisdiction, as doing so would waste judicial resources. As discussed above,  
13 using Rule 21 in this manner is discretionary. Even accepting without argument that the Lloyd’s  
14 Defendants are dispensable, see Remand Opp’n at 9, the Court is not obliged to sever them from  
15 the case. Rather, a limit on the Court’s discretion would arise only if the Lloyd’s Defendants are  
16 indispensable, in which case the Court would be prohibited from severing them to maintain  
17 diversity. Defendants argue that all four of the Rule 19(b) factors weigh “in favor of dismissing  
18 the Lloyd’s Defendants,” but provide no authority that endorses construing the factors in this way.  
19 See id. Even accepting Defendants’ application of the factors as correct, the factors are  
20 outweighed considerably by the larger interest in justice, specifically judicial efficiency, and the  
21 general presumption towards remand.

22 The Court will not sever the Lloyd’s Defendants, because doing so will only add to the  
23 already-prolific litigation surrounding the underlying dispute here. CNA filed the first suit  
24 concerning this controversy in the U.S. District Court for the District of Connecticut, where that  
25 suit continues. See Transfer Mot. at 3–4. Soon after, PHL filed its own action in the San  
26 Francisco Superior Court. See generally FAC. Defendants then removed that case to this Court.  
27 See generally Notice. PHL intimates that it could simply refile or resume the action against  
28 Lloyd’s in state court if the Court elects to sever it. See Remand Reply at 9 (“It would make no

1 sense to force PHL to litigate in two different forums to obtain the same declaratory relief  
2 judgement") (emphasis in original). Thus, if the Court did sever the non-diverse Lloyd's  
3 Defendants, and retain jurisdiction over the claims against CNA, there could be three cases  
4 progressing simultaneously, in three different courts, in two different jurisdictions, all concerning  
5 substantially the same controversy. This outcome imposes needless burden on all involved, and  
6 creates a risk of inconsistent rulings that would confound the due administration of justice. The  
7 Court does not sever the Lloyd's Defendants from this action.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court GRANTS the motion to remand the case to the San  
10 Francisco Superior Court, and DENIES AS MOOT CNA's motion to dismiss or stay, or transfer,  
11 and the Lloyd's Defendants' motion to dismiss.

12 **IT IS SO ORDERED.**

13 Dated: March 18, 2020



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14 CHARLES R. BREYER  
15 United States District Judge  
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